

(2004) 05 BOM CK 0015

In the Bombay High Court

Case No : Company Petition No. 342 of 2003 and Company Application Lodg.
No. 65 of 2004

Pulsar International Ltd.

APPELLANT

Vs

Prime Investrade Finance Services Ltd.

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Companies Act, 1956 — Section 433, 434

Citation : (2004) 6 BomCR 236 : (2005) 127 CompCas 579 : (2004) 4 CompLJ
397 : (2004) 55 SCL 32

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : M.P.S. Rao, for the Appellant; Haresh Mansukhani, for the
Respondent

Final Decision : Dismissed

Judgement

Anoop V. Mohta, J.—Petitioner-company viz. M/s. Pulsar International Limited having its registered office at Jaishree, 28, Jawaharlal Nehru Road, Vakola, Santacruz (East), Mumbai 400057, has invoked the provisions of Sections 433, 434 and 439 of the Companies Act, 1956 ("Companies Act") with basic prayers to wind up the respondent-company viz. Prime Investrade Finance Services Limited, having its registered office at Haji Adam Mansion, 2nd floor, 6, Homji Street, Sir P.M. Road, Fort, Mumbai.

2. Basic facts are that the respondent company is a Member of the National Stock Exchange. The petitioner-company had trade transaction with the respondent company. By cheque dated 24th September, 1996, a sum of Rs. 5 lakhs was paid by the petitioner to the respondent company. In respect of the said trade transactions, the petitioner made profit of Rs. 1,02,861 as per the Bills raised by the respondent-company on the petitioner. The trading facilities of the respondent company were terminated by the National Stock Exchange and, therefore, further trade transactions could not be continued. The respondent

company, as alleged, from time to time, made payment of Rs. 1 lakh towards the principal amount out of Rs. 5 lakhs. The part principal amount was paid firstly, on 9th September, 1998, of Rs. 25,000 and secondly, on 17th December, 1999, of Rs. 75,000 totalling Rs. 1 lakh. The respondent-company, as alleged therefore, has failed and neglected to make the balance of payment Rs. 4 lakhs with interest at the rate of 18 per cent.

3. Therefore, by statutory notice dated 26th August, 2003, petitioner-company had demanded the balance amount with interest i.e., a sum of Rs. 8,07,687 as per particulars set out in the notice. The said notice was duly received by the respondent company. No reply was sent by the respondent-company to the same. The present Company Petition, there-fore was filed on 11th October, 2003. The petitioners contend that the respondent-company have been unable to meet its due debt and liability. The respondent-company ought to be wound up under Sections 433 and 434 of the Companies Act.

4. By an Affidavit dated 8th January, 2004, the Director of the respondent-company resisted the said Petition, as well as, the averments made therein. The basic case of the respondent company is that the alleged claim is time barred and, therefore, the Petition itself is not maintainable. The alleged amount of Rs. 5 lakhs was never advanced by the petitioner-company to the respondent company. The said amount was, in fact, paid by the petitioner to one sole proprietor concern of the deponent i.e., Kamlesh Thakur, a Director of the respondent-company. M/s. Investrade was the sole proprietary concern of the said Mr. Kamlesh Thakur. The said cheque of Rs. 5 lakhs was sent by the petitioner alongwith covering letter dated 24th September, 1996, to the sole proprietor Mr. Kamlesh Thakur of M/s. Investrade. Admittedly, the payment of Rs. 25,000 on 9th September, 1998 and Rs. 75,000 on 17th December, 1999, as relied by the petitioner-company, as payment of the part principal amount, were made by the said M/s. Investrade in full and final settlement of the petitioner-company's claim against the said proprietary firm. The Bank's statements of the said proprietary firm M/s. Investrade also reflects the said part payment. In reply, it is also contended that the profit of Rs. 1,02,861 made by the petitioner in various deals done through the respondent-company had no connection or nexus with the said amount of Rs. 5 lakhs paid by the petitioner to the said proprietary concern M/s. Investrade as clearly recorded in the covering letter dated 24th September, 1996. Therefore the respondents have denied the amount and the interest, as claimed by the petitioner-company. It is further contented that the respondent company is a fully functional concern having surplus reserves and net worth of more than Rs. 1 crore and, therefore, there is no question of any direction, as prayed.

5. Petitioner-company, however by its rejoinder dated 21st January, 2004, reiterated its original stand.

6. Petitioner-company had also taken out Company Application (Lodg.) No. 65 of 2004 in the present Company Petition against the respondent company and

prayed to take appropriate action against Kamlesh Thakur, Director of the respondent company for having made false statements on oath and/or to grant permission to the petitioner to prosecute the said Kamlesh Thakur. However, this application was not pressed by the learned counsel appearing on behalf of the petitioner-company at the end of the hearing of the Company Petition. Therefore, it is disposed of accordingly.

7. The undisputed position, which emerges from the record, as well as, from the submissions made by the respective parties is that the cheque of Rs. 5 lakhs was dated 26th November, 1996. The alleged last part principal amount was paid admittedly by Kamlesh Thakur on 9th September, 1998 and 17th December, 1998 i.e., Rs. 25,000 and Rs. 75,000 respectively. This Rs. 1 lakh was paid by the said Kamlesh Thakur as a proprietor of M/s. Investrade, as referred above. Accordingly, there are documents on record to support the said case of Kamlesh Thakur.

8. One cannot overlook the fact that, the last payment of 17th December, 1999, which was made by the said Kamlesh Thakur, only brings the claim of the petitioner-company within limitation, if any. The issue of limitation, on the face of the record, needs detail discussion and evidence. Prima facie, if this amount is paid by Kamlesh Thakur in his individual capacity and not as a Director of the respondent-company, the claim of the petitioner-company is beyond limitation from the date of issuance of the main cheque, which was admittedly of the year 1997. Considering the averments made, as well as, the documents filed on record by the respective parties, I am satisfied that, at least at this stage, for the purpose of Company Petition under Sections 433 and 434 of the Companies Act, there are various disputed questions of facts which need detail evidence and material on the record. Under which capacity Mr. Kamlesh Thakur had made the payment, cannot be decided in a Winding Up Petition at this stage. The letter dated 24th September, 1996, whereby the cheque was issued by the petitioner-company admittedly reflects that the said cheque of Rs. 5 lakhs was paid to Kamlesh Thakur and not to the respondent-company, as is sought to be contended by the petitioner-company. The Bank statements placed on record by the respondent-company further demonstrates that the two instalments, as referred and relied by the petitioner company had been paid by the said Kamlesh Thakur, through his Proprietary Concern M/s. Investrade on 10th September 1998 and 8th December, 1999. This Bank Account Statement could not be disputed by the petitioner-company. The various transactions referred above between the petitioner-company and the respondent company, in my opinion, cannot bring the case of the petitioner-company under the purview of Sections 433 and 434 of the Companies Act, as is sought to be contended.

9. Counsel for the respondent-company relied on Azizur Rahaman Osmani and Another Vs. Upendra Nath Samanta and Others, and contended that the payment made by the person, in absence of any evidence to the contrary, is presumed to be in discharge of his own liability. The effect of an acknowledgement in Section

19 of the Limitation Act is more restricted and in general, it only affects the person giving it. But, payment made u/s 20 affects, not only the person making the payment, but also the persons who are liable. The question, therefore, is under which capacity the particular payment or repayment was made by Mr. Kamlesh Thakur: whether as Director of the respondent company or whether as Proprietor of M/s. Investrade, as referred above. In my view, the material submitted and/or placed on record by the respondent company with the Affidavit of Mr. Kamlesh Thakur, prima facie, shows that those payments have been made to Mr. Kamlesh Thakur and not by the respondent company. The repayment, as referred, was made by Kamlesh Thakur in his individual capacity as a Proprietor and not as a Director of the company. Therefore, even if these are the admissions and or acknowledgement of the part payment made by Mr. Kamlesh Thakur, that it self cannot be the reason to consider that the present Petition, is within the ambit of Sections 433 and 434 and such disputed acknowledgements itself are sufficient to wind up the respondent company. This controversy, according to me, tips the issue in favour of the respondent. In view of the settled principle of law, there is no case made out by the petitioner-company that the respondent company "neglected to make the payment" or "failed to make the payment" or "inability to make the payment" and/or "loss its substratum" or "became insolvent". There is no just and convenient reason which justifies to allow this Petition, as prayed.

10. In view of the above, the Petition is dismissed with no order as to costs.